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No. 82-1187

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

JOHN M. MURPHY,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITIONER MURPHY'S REPLY MEMORANDUM

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The government in opposition to Point III, "The Deliberate Impariment Of Accurate Fact-Finding In ABSCAM Violated Petitioner's Due Process Rights," raises for the first time a waiver argument. It argues that our due process contention

> [i]s precisely the kind of issue one would have expected petitioner Murphy to raise forcefully before the jury, and there is no reason to second-guess the jury's resolution of it.

Opp., p. 22, n.21.

Petitioner initially attempted to raise his due process defense pre-trial. *See* Transcript of July 11, 1980, pre-trial motions hearing. The Court reserved rulings on the due process challenge until post-trial hearings could be conducted, if necessary. Memorandum Decision and Order, August 5, 1980. At trial Petitioner was repeatedly precluded by the trial judge from pursuing examination of witnesses or lines of argument that related to the due process defense. Murphy Tr., *e.g.*, 1053, 1157. Petitioner

had no opportunity to present these issues to the jury, which was instructed to not consider them.

In sum, the government's reply to our petition is like a shell game, with three shells and no pea. The deliberately created ambiguities, that risked a jury finding of guilt for conduct not only legal but protected by the first amendment, are claimed to have been jury issues. Yet the jury was never given the chance to evaluate them. This claim of waiver is then advanced to insulate the Court of Appeals' holding from review in this Court.

Petitioner, unlike all of the other ABSCAM defendants, was acquitted of bribery. The risk of the jury incorrectly assessing key elements like intent in the context of the remaining counts of the indictment was pushed to the breaking point by the government's deliberate failure to make a clear offer of criminality or to otherwise eliminate the ambiguities surrounding its proffered evidence of criminality.[1]

Respectfully submitted,

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[1] The government disclaims control over these events. Opp., p. 22, n.21. It did, however, completely control the manner in which its agents would make the offer of criminality and key factors such as whether money would be displayed or paid directly to the Congressman.